

**FILED
Court of Appeals
Division II
State of Washington
12/16/2022 3:33 PM
CASE NO. 57043-2 II**

Division II of the Court of Appeals

For the State of Washington

Armed Citizens' Legal Defense Network

v.

Office of Insurance Commissioner

Reply Brief

Attorneys for Appellant

Spencer D. Freeman
Freeman Law Firm, Inc.
1107 ½ Tacoma Avenue South
Tacoma, WA 98402
(253)383-4500

Dennis W. Polio
Edward Wenger
Holtzman Vogel
2300 N. Street Northwest, Suite 643A
Washington, D. C. 20037

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INTRODUCTION

Conspicuously absent from the Commissioner's forty-three-page brief is any—not even one—citation to a case, statute, regulation, law-review article, treatise or any other conceivable source of authority establishing that the services provided by the Network constitute the sale of insurance contracts. They have cited none because there are none. And even more noticeably absent is any acknowledgment from the Commissioner that: (1) “[o]ne of the fundamental assumptions deeply embedded in insurance law is the principle that an insurer will not pay for a loss unless the loss is ‘fortuitous,’” which means that “the loss must be accidental in some sense,” 1 Appleman on Insurance Law Library Edition § 1.05; and (2) the Washington Supreme Court's unequivocal pronouncement, based on “settled Washington law[,] . . . that self-defense” is necessarily a “deliberate act,” not an accidental one. *Grange Ins. Co. v. Brosseau*, 776 P.2d 123, 126 (Wash. 1989).

Those two principles, the latter of which is binding on this Court and on the Commissioner and the former of which is inarguable, compel reversal. And while those two points deliver the legal basis for demonstrating the illegality of the Commissioner's actions, the Commissioner's brief itself demonstrates how imperative it is that this Court rein in the Commissioner's serial overreach. Despite Washington Supreme Court caselaw establishing definitively “the *deliberate* nature of [any] act” of justified self-defense, *id.* (emphasis added), the Commissioner has undertaken a crusade against no fewer than five entities that, as best as the Network can tell, the Commissioner had no authority to regulate. *See* Resp. Br. at 7–11 (discussing the Commissioner's “Investigation of Illicit Self-Defense Insurance”).¹

¹ As discussed *infra* at 4–6, even if entities like the National Rifle Association or the United States Concealed Carry Association were to provide services that satisfy the definition of insurance under RCW § 48.01.040, the services provided by the Network differ qualitatively from those offered by the entities cited in the Commissioner's brief.

Therein lies the problem for the Commissioner. None of his previous enforcement actions received judicial imprimatur, and each was undertaken against the backdrop of the Supreme Court's conclusion that self-defense is not, and cannot be, a "determinable contingency." RCW § 48.01.040; *see also Grange Ins. Co.*, 776 P.2d at 126. It follows, then, that each represents the next in a series of decisions by the Commissioner to unsheathe the State's police power to bully into submission an industry for which he disapproves, all without legal authority.

The Court can end this practice now. No matter one's opinions regarding the Second Amendment, the rule of law abhors the sort of excesses that culminated in this case. Given the statutory definition of insurance and the caselaw interpreting it, it cannot be said that the Network is engaged in selling insurance contracts. The trial court erred by arriving at the opposite conclusion, and this Court should reverse.

ARGUMENT

Before explaining why the Commissioner's legal reasoning is fatally flawed, a few points of factual clarification are in order. The Commissioner's brief notes that the Commissioner has embarked on a campaign against what he has dubbed the "Illicit Self-Defense Insurance" industry. Resp. Br. at 7–11. As discussed below, an act of self-defense cannot, as a matter of law, be considered a determinable contingency, *infra* at 18–25, which renders highly suspect the Commissioner's entire anti-self-defense campaign. It bears noting, however, several factual differences between the services offered by the Network and the other organizations that have felt the Commissioner's focused wrath.

At bottom, the Network has offered a way in which its members can pool their resources so that, if one of the members engages in a justifiable act of self-defense, she can mount a credible defense. This is entirely and qualitatively different than the services offered by, for instance, Lyndon Southern. Whereas

the Network retains discretion to determine whether an act of self-defense is indeed justified (and as discussed below, retains further discretion even after arriving at that conclusion, *see infra* at 7–12), Lyndon Southern customers apparently have access to those funds without a similar determination or exercise of discretion. According to the Commissioner, the only reason why Lyndon Southern may operate in the State of Washington is that it now includes in its written policy that it reserves the right to require reimbursement for the costs of the defense from the customer in the event they either are found guilty or plead guilty to a related crime.

The Commissioner also discusses both the United States Concealed Carry Association and Firearms Legal Protection. As an initial matter, both companies explicitly advertise themselves as providing “self-defense insurance” (as did the National Rifle Association when it advertised Carry Guard), while the Network makes clear in all respects that it is *not* an insurance provider. And while the Network pools its resources and retains discretion

to use that pool at it sees fit, USCCA, Firearms Legal Protection, and Carry Guard are all underwritten by traditional insurance companies. The Network is not.

At bottom, none of the other companies targeted by the Commissioner promote the concept that a request for financial assistance after a use-of-force incident might be turned down after a request is made. In stark contrast, the Network places beyond peradventure that any request for assistance will be assessed *after* a determination by the Network's Advisory Board that a legitimate act of self-defense occurred, and will then be subject to a further discretionary decision of the Network's leadership. This is why the Network is different, and this is why the Network does not, as a matter of law, provide insurance, even if other entities in fact do.²

² It bears reiterating that (as far as the undersigned is aware) not one of the Commissioner's other enforcement actions ever received approval by a court. A sue-and-settle pattern of this ilk suggests that the Commissioner is using the Leviathan power of the State to bully those it dislikes. It does not at all suggest that his legal reasoning is sound.

I. AS A MATTER OF LAW, THE NETWORK DOES NOT ENTER INTO CONTRACTS WITH ANYONE TO PROVIDE FINANCIAL ASSISTANCE AFTER A USE-OF-FORCE INCIDENT.

Both the Network and the Commissioner agree that, to have an insurance contract, a contract must exist. *See* RCW § 48.01.040; *Physicians' Def. Co. v. Cooper*, 199 F. 576, 579–80 (9th Cir. 1912). They are also in accord that “[i]f the provisions of an agreement leave the promisor’s performance entirely within his discretion and control, the ‘promise’ is illusory,” because “[w]here there is an absolute right not to perform at all, there is an absence of consideration.” *Felice v. Clausen*, 590 P.2d 1283, 1285 (Wash. Ct. App. 1979). The question, then, is what does the Network promise its members?

The most obvious source to explain what members receive in exchange for their membership dues is the Explanation of Membership Benefits. And the Explanation of Membership Benefits makes crystal clear that the Network retains discretion as to whether it will provide funding to a member if that member uses force against another person:

- If criminal charges or other litigation results from the self-defense incident, the member and his or her attorney *can request* a grant of further financial assistance from the Network to defray the cost of going to trial.
- The Network’s Advisory Board will review the facts of the case and advise the Network leadership on specific issues of legal self defense *on which decisions to grant financial support rest*.
- This step is in place to assure the Network that the Legal Defense Fund is not wasted defending a criminal act and that the member’s actions were indeed justifiable.
- This review is never undertaken to deny assistance to a member who acted in legitimate self defense, but rather to prevent accusations that the Network supports or encourages use of force without justification.

AR at 265 (emphases added).

According to the Washington Supreme Court, a contract’s terms must be definite enough to “‘fix exactly the legal liability of the parties.’” *Keystone Land & Dev. Co. v. Xerox Corp.*, 94 P.3d 945, 949 (Wash. 2004) (quoting *Sandeman v. Sayres*, 314 P.2d 428, 429 (Wash. 1957)). Based on the foregoing, the “exact[]” promise that the Network makes to its members is: If

the member is involved in a use-of-force incident, her case will be reviewed by the Network's Advisory Board, after which the Network's leadership will decide whether to provide funds and, if so, how much to provide.

For this reason, the Commissioner is flat wrong to assert that “[n]owhere in its printed or online advertising does [the Network] inform potential members that the decision to pay legal fees is subject to the sole discretion and whim of the president or officers of” the Network. Resp. Br. at 15. The Network is *not* “offering Washington consumers the promise that the Legal Defense Fund will cover consumers’ legal expenses if they pay the requisite consideration[,]” Resp. Br. at 21; no amount of the Commissioner’s *ipse dixit* can change the fact that there are two intermediate, discretionary steps between a member paying “the requisite consideration” and coverage of that member’s legal expenses. First, “[t]he Network’s Advisory Board [must] review the facts of the case and advise the Network leadership on specific issues of legal self defense,” and second, the Network

must then reach a “decision[] to grant financial support.” AR at 265.

In other words, the plain terms of the Network’s membership agreement “leave[s] the [Network’s] performance entirely within [its] discretion and control,” which means that any purported “‘promise’” of legal financial support “is illusory.” *Felice*, 590 P.2d at 1285. “When[,]” as here, “there is an absolute right to not perform”—i.e., pay legal expenses—“at all, there is an absence of consideration.” *Interchange Assocs. v. Interchange, Inc.*, 557 P.2d 357, 361 (Wash. Ct. App. 1976). This is not, as the Commissioner would have it, a “conclusory statement[] of subjective belief.” Resp. Br. at 25. It is instead the necessary and objectively correct interpretation of the plain language in the Explanation of Member Benefits.

So long as the Network must reach a “decision[] to grant financial support” (a decision which is itself informed by a separate decision of the Network’s Advisory Board) before any member receives financial support, then no member can claim to

have a contractual right to that financial support based on her membership fees. Without a contractual right to fees, there can be no insurance contract. And without an insurance contract, the Commissioner's enforcement actions against the Network cannot stand.

Finally, it bears noting that every single shred of evidence offered by actual Network members in this case show that not one member believes that she has entered into an insurance contract, and everyone understands that the provision of legal funds is dependent entirely on the discretion of the Network's leadership. This should, and does, inform the common objective understanding of membership benefits, and every one of them supports the Network's position. The Commissioner had the liberty to counter this evidence, but apparently, he could find no person to support his crabbed reading of the Network's documents.

All he offers instead is a half-hearted parade of horrors about regulatory evasion that is, at bottom, utterly illogical. He

never explains how or why an insurance customer would sign an attestation with an actual insurance provider stating that the insurance provider can deny him the services he pays for. That is because—unlike here—when people who want insurance buy insurance, they expect (and will not sign an attestation denying) their right to get what they pay for from the insurance company they’ve chosen. The only conceivable reason why dozens of the Network’s members would sign the attestations offered here is that the natural, objective, common understanding of Network membership does not actually guarantee them a right to financial assistance if they are involved in a use-of-force incident. Underscoring the nonsense of the Commissioner’s argument on this point is that, in support of his pronouncement that “Washington courts have repeatedly rejected such contrived attempts to evade regulation,” he cites absolutely nothing. Resp. Br. at 32.

II. THE MONETARY SUPPORT PROVIDED THROUGH THE NETWORK’S DISCRETIONARY ACTS CONSTITUTES NEITHER INDEMNIFICATION NOR AN AGREEMENT TO PAY A SPECIFIED AMOUNT.

Even if contracts had arisen between the Network and its members (and they have not), those are neither contracts for indemnification nor contracts for a specified amount. RCW § 48.01.040. “Indemnification” is either “(1) reimbursement for a loss suffered because of a third party’s act or default, (2) a promise to reimburse another for such a loss, or (3) to give another security against such a loss.” *Indemnification*, Black’s Law Dictionary (7th ed. 1999). Each of these prongs requires “a loss suffered because of a third party’s act or action.” *Id.*³

The Network does not, and never has, offered any financial recompense for losses at all, including those that occur because of a third party’s actions. They might, in their discretion, offer financial assistance to help defray costs that arise because

³ The Commissioner’s bald assertion that “the dictionary definition of indemnify does not require a third-party loss[]” is, quite obviously, contradicted by the Black’s Law Dictionary definition. Resp. Br. at 35.

of a *member's* deliberate, rational, intentional actions. As discussed below, *see infra* at 18–25, an act taken in justifiable self-defense must, as a matter of blackletter law, be taken deliberately and only after assessing a situation and reasonably determining that a threat of grave bodily injury or death is imminent. If a member takes an intentional and justifiable step to protect himself or another innocent person, the Network may, in its discretion, help pay for costs flowing directly and solely from *the member's intentional decision*.

This point bears emphasizing. Losses “suffered because a third-party’s act” might include medical expenses incurred by a violent attacker, or property loss due to a home invader. The Network does not provide any assistance whatsoever for these losses, nor does it ever promise to make the member “whole” in the well-accepted, holistic sense of the term “indemnification.” Court costs, bail, legal fees, expert retention, and the like—the expenses that the Network *might* help defray—result from the intentional self-defense actions of the member. To borrow from

the world of tort, the proximate cause of the expenses that the Network might help cover is the deliberate, reasonable, lawful act of the Network's member—not the attacker whose actions prompted the member's lawful self-defense response. Or, as formulated by the Washington Supreme Court roughly fourscore years ago, the member's actions are “a new proximate cause which breaks the connection with the original cause and becomes itself *solely responsible* for the result.” *Richey & Gilbert Co. v. Nw. Nat. Gas Corp.*, 134 P.2d 444, 450 (Wash. 1943) (emphasis added).

Viewed in this (correct) light, the discretionary assistance provided by the Network cannot be considered indemnification. Nor does the Network promise to pay any “specified amount.” Both the Commissioner and the court below glommed on to a stray statement in an outdated Network brochure that it might provide “up to \$25,000 in bail assistance.” AR at 262. The Network, however, discontinued use of that statement *before* the Commissioner began its misguided enforcement action, so it

cannot, as a matter of law, provide any basis for either a “cease-and-desist” demand or an exorbitant fine.

The Network’s position is not, as the Commissioner badly mischaracterizes it, that “unless an *exact* amount is stated, the term ‘specified amount’ is not satisfied.” Resp. Br. at 32 (emphasis in original). The Network’s position is that the term “specified” in RCW § 48.01.040’s “specified amount” has to have *some* operative effect. *See Murray v. Dep’t of Labor & Indus.*, 275 P. 66, 69 (Wash. 1929) (Washington courts adhere to the “cardinal rule of statutory construction” against surplusage that gives effect to “each word” when possible). Because the Network retains discretion to assist with all, part, or none of the legal costs associated with a self-defense act, it is not bound to provide any “specified” amount whatsoever. The Network might help a member make bail, part of bail, or none of it, depending on, e.g., the amount of bail set and the member’s situation. It might help fund a member’s entire legal defense, or it might exercise its discretion to fund part of it. At the risk of redundancy,

it bears reiterating that the Network is, at its core, a way to pool resources—it is not underwritten like insurance companies. In a world in which self-defense trials last for months and rack up multi-million-dollar attorneys’ fees bills, the Network may, and has the discretion to, decide not to drain the entirety of its members’ pooled resources on any one incident.

The Network’s members know this. The Network’s leadership engages with them regarding the amount it holds for them, and it solicits the advice of the members to determine how best to allocate those funds.⁴ The upshot of this deliberative,

⁴ Examples of this iterative engagement as to use of funds are plentiful on the Network’s website. *See, e.g., President’s Message*, Armed Citizens Legal Defense Network, Inc., <https://armedcitizensnetwork.org/june-2015-presidents-message> (June 2015) (“I asked members if the Network should offer a bail assistance program of some type.”); *id.* <https://armedcitizensnetwork.org/our-journal/archived-journals/286-may-2013#President> (May 2013); *Editor’s Notebook*, Armed Citizens Legal Defense Network, Inc., <https://armedcitizensnetwork.org/february-2018-editorial> (Feb. 2018); <https://armedcitizensnetwork.org/september-2018-editorial>; <https://armedcitizensnetwork.org/march-2019-editorial>;

collaborative, evolving process is that, at bottom, the Network does not, will not, and *cannot*, agree to assist with any “specified amount” of legal assistance, even if it exercises its discretion to provide *some* legal assistance. RCW § 48.01.040. Accordingly, the Court should reverse.

III. SELF-DEFENSE IS NOT, AND CANNOT BE, A DETERMINABLE CONTINGENCY.

To smash the self-defense peg in the determinable-contingency hole, the Commissioner offers the position that an act of self-defense is something that happens to a person. Doing so is necessary because, as the Commissioner rightly

<https://armedcitizensnetwork.org/july-2018-presidents-message>;
<https://armedcitizensnetwork.org/december-2018-presidents-message>;
<https://armedcitizensnetwork.org/february-2019-presidents-message>;
<https://armedcitizensnetwork.org/august-2019-presidents-message>;
<https://armedcitizensnetwork.org/2018-state-of-the-network>;
<https://armedcitizensnetwork.org/july-2017-book-review>;
<https://armedcitizensnetwork.org/october-2017-presidents-message>;
<https://armedcitizensnetwork.org/1-million-legal-defense-fund>.

acknowledges, an event must be future and uncertain to be categorized as a determinable contingency. *Mendoza v. Rivera-Chavez*, 999 P.2d 29, 34 (Wash. 2000). In other words, “the loss must be accidental in some sense.” 1 Appleman on Insurance Law Library Edition § 1.05. Unless an act of self-defense fits this category, resource pooling to potentially defray the financial repercussions of a use-of-force incident cannot be considered the provision of insurance under Washington law.

Those principles should end this case against the Commissioner. Any time a person acts in justifiable self-defense, he or she must arrive at “an individualized determination of necessity.” *State v. Brightman*, 122 P.3d 150, 158 (Wash. 2005). In other words, self-defense is always an intentional act; if it were not, it could not be considered self-defense.

This Court need not take the Network’s word for it. The Washington Supreme Court has already arrived at the same conclusion, and it did so in the insurance context. The issue in *Grange Insurance* was whether an insurance company had “a

duty to defend its insured in a wrongful death action where the insured allegedly killed the decedent in that action in self-defense.” 776 P.2d at 124. The answer to that question turned on whether a self-defense homicide was “an ‘occurrence,’ where bodily injury results from ‘an accident.’” *Id.* at 125. To answer that question, the Supreme Court reasoned as follows:

In his deposition testimony [the self-defender] explained that [the decedent] was coming at him with a knife, that [the decedent] was “going to gut” him, and that there was no doubt in his mind. He stated: “I shoved [the decedent’s wife] to one side and I grabbed the slide on that pump gun, I pulled the trigger and I pumped it and I shot him right on that second button.”

[The self-defender’s] statement establishes that he pumped the shotgun, aimed it at [the decedent], and pulled the trigger. [The self-defender’s] own words confirm that he deliberately fired the shotgun at [the decedent]. *The fact that he claims to have done so in self-defense in no way negates the deliberate nature of his act.*

Id. at 125–26 (emphasis added) (some alteration in original).

In that case, the policies at issue covered “only accidents, a term long defined in this state’s cases, and the facts as stated by the insured unambiguously take the incident here out of this

definition.” *Id.* at 126. “The policies [did] not cover injuries expected or intended from the standpoint of the insured,” and because there was “no serious question that when [the self-defender] intentionally shot [the decedent], he expected serious injury or death to result,” the self-defender was not covered. *Id.*

These same principles apply to this case. Just as the term “accidental” forecloses applicability to intentional acts, so too does the phrase “determinable contingency,” and the Commissioner never once argues otherwise. Instead, he offers *Grange Insurance* for the position—without explaining—that the Washington Supreme Court somehow “indicated that self-defense insurance could be permissible.” Resp. Br. at 38. Unless and until the Washington legislature amends the Washington insurance code to remove the “determinable contingency” requirement, the necessary implication of *Grange Insurance* (i.e., that a legitimate act of self-defense cannot be considered “accidental”), the Commissioner’s position is legally doomed.

Mendoza v. Rivera-Chavez provides an independent basis for rejecting the Commissioner’s position vis-à-vis the phrase “determinable contingency.” 999 P.2d 29. In that case, the Washington Supreme Court declared that “[i]nsurance is by its nature prospective and not retrospective, as can be seen from the statutory definition of an insurance contract as ‘a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable *contingencies*.’” *Id.* at 34 (emphasis in original) (quoting RCW § 48.01.040 and citing *State v. Universal Serv. Agency*, 151 P. 768, 722 (Wash. 1915)); 1 Eric Mills Holmes & Mark S. Rhodes, *Holmes’s Appleman on Insurance*, 2D § 1.3, at 13 (1996) (“An insurance agreement is an aleatory contract. Aleatory is derived from the Latin ‘alea’ meaning dice. An insurer’s promise is conditioned upon the occurrence of an uncertain, fortuitous event, that is, a chance event.”). At issue in that case was the excludability of felony homicide and felony assault in a motor vehicle insurance policy. In resolving that issue, the Court held that, because “a

determination of whether the felonies of vehicular homicide or vehicular assault have occurred cannot be made until after injuries to the victim have been assessed” (i.e., “[t]his assessment must necessarily occur after an accident and cannot be made in advance, at the time the insurance policy is purchased”), the felonies of vehicular homicide and assault were not “determinable contingencies.” *Id.* at 34.

The same principles apply to an act of self-defense. That is to say, the Network’s discretionary decision to provide legal financial assistance—or to exercise its discretion not to do so—is inherently and necessarily a retrospective one. Determining whether a member’s use-of-force was indeed a lawful act of self-defense (and then determining how much, if any, financial assistance the Network will provide) “must necessarily occur *after*” a use-of-force incident. *Id.* Simply put, because “[i]nsurance is by its nature prospective and not retrospective,” the backward-looking discretion the Network retains means the

member benefits cannot, as a matter of Washington's definition of insurance, be considered the provision of insurance.

To reiterate: The "longstanding rule" in Washington is that "evidence of self-defense must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." *State v. Janes*, 850 P.2d 495, 504 (Wash. 1993). Each lawful self-defense act differs from every other self-defense act because the decision to respond to force with force necessitates a reasoned assessment of the threat, a reasoned determination (based on, among many other things, the defenders' age, education, training, experiences), and then a deliberate, reasoned, intentional decision to act against that threat (rather than, e.g., acquiesce to the threat, flee the threat, etc.).

That said, one of the few universally applicable ingredients to *every* justifiable self-defense act is a reasoned, intentional, deliberate act on behalf of the defender. This is true in Washington, and as far as the undersigned is aware, it is true

in every United States jurisdiction. Construing the definition of self-defense in a way that removes the intentionality ingredient would rupture the definition of self-defense for purposes of Washington law and would put Washington at odds with the entirety of the Anglo-American self-defense tradition. Doing so, however, is the only way to contort the concept of self-defense to fit the definition of a determinable contingency. Respectfully, the Network suggests that the Court should decline the Commissioner's invitation to do so here.

**IV. IF THE COMMISSIONER IS CORRECT, THEN
WASHINGTON'S DEFINITION OF INSURANCE IS VOID FOR
VAGUENESS.**

To succeed, the Commissioner must (1) entirely rewrite the elements of a contractual agreement, (2) either redefine the word "indemnity" or read out the word "specified" from "specified amount," *and* (3) create a brand-new legal concept of self-defense that entirely removes the requirement that a self-defender must act reasonably and deliberately. If it can do so, and if, as a result, what the Network provides does indeed meet the

definition of insurance, then the definition of insurance is so hopelessly vague that it does not give any person of normal intelligence a sense as to what it forbids.

Every example in the record demonstrates that the average person of normal intelligence believes that the Network is not engaged in the practice of insurance. Every lawyer of normal intelligence knows the elements of contract, can apply a multi-pronged definition of indemnity from Black's Law Dictionary, and can grasp that an objectively reasonable self-defense response to a deadly force situation must necessarily involve an intentional, reasonable, decision. If none of those matter, then all of us are just "guess[ing] at [the] meaning" of Washington's insurance code. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). And if we are, then the insurance code is unconstitutionally vague.

CONCLUSION

For the foregoing reasons, the Superior Court erred as a matter of law when it affirmed the Commissioner's decision and held that the Network entered into contracts of insurance with its members when it accepted membership fees. Network memberships do not constitute insurance contracts, and, accordingly, this Court should reverse.

I certify that this brief is in 14-point Time New Roman font and contains 4,362 words, in compliance with the Rules of Appellate Procedure RAP 18.17(b).

Dated this 16th day of December, 2022.

Spencer D. Freeman

Spencer D. Freeman, WSBA #25069

Attorney for Appellant

Edward M. Wenger

Edward M. Wenger Pro Hac Vice

Attorney for Appellant

Dennis W. Polio

Dennis W. Polio, Pro Hac Vice

Attorney for Appellant

DECLARATION OF SERVICE

I hereby certify that on December 16, 2022, a copy of the foregoing **Document** and this **Declaration of Service** were served on the parties below as noted:

Marta DeLeon

Attorney For Respondent
Office of the Attorney General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360)753-3168
Marta.deleon@atg.wa.gov

I Certify under penalty of perjury of the law of the state of Washington that the foregoing is true and correct.

Signed this 16th day of December, 2022 at Tacoma, WA

Elizabeth Chaves
Elizabeth Chaves
Litigation Paralegal

FREEMAN LAW FIRM, INC.

December 16, 2022 - 3:33 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 57043-2
Appellate Court Case Title: Armed Citizens' Legal Defense Network, Inc, App v. Office of Insurance Commissioner, Resp
Superior Court Case Number: 20-2-00723-2

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